

APPEAL NO. 091101
FILED SEPTEMBER 30, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 25, 2009. The issues before the hearing officer were:

- (1) Does the compensable injury of _____, extend to bilateral lumbar IVD and lumbar herniations at L4-5 and L5-S1? (the bilateral lumbar IVD condition was resolved by stipulation)
- (2) Has the appellant/cross-respondent (carrier) waived the right to contest compensability of bilateral lumbar IVD and lumbar herniations at L4-5 and L5-S1 by not timely contesting the diagnoses in accordance with Section 409.021? (the bilateral lumbar IVD condition was resolved by stipulation)
- (3) Did the respondent/cross-appellant (claimant) have disability resulting from the compensable injury, and if so, for what period(s)? (the disability period from September 11 through November 5, 2008, was resolved by stipulation, and the disputed period of disability was from November 6, 2008, through June 25, 2009, the date of the CCH)

The parties resolved a portion of the disputed issues by stipulating that: (1) the claimant's compensable injury of _____, extends to bilateral lumbar IVD; (2) "[t]he issue of waiver is moot herein as it relates to a bilateral lumbar IVD condition"; and (3) the claimant did not have disability due to his compensable injury from September 11 through November 5, 2008.

The hearing officer determined that: (1) the claimant's compensable injury of _____, extends to a disc herniation at L5-S1, but does not extend to a disc herniation at L4-5; (2) the carrier waived the right to contest compensability of a disc herniation at L5-S1, but the carrier did not waive the right to contest compensability of a disc herniation at L4-5; and (3) the claimant had disability from November 6, 2008, through January 4, 2009, but did not have disability from January 5 through June 25, 2009, the date of the CCH.

The carrier appealed the hearing officer's determination that the carrier waived the right to contest compensability of a disc herniation at L5-S1, and that the claimant's compensable injury extends to a disc herniation at L5-S1. Also, the carrier appealed the hearing officer's determination that the claimant had disability from November 6, 2008, through January 4, 2009. The claimant responded, urging affirmance.

The claimant filed a single document entitled "Claimant's Response to Carrier's Request for Review and Claimant's Request for Review of the Contested Case Hearing Officer's Decision and Order." In that document, the claimant cross-appealed the

hearing officer's determinations that the carrier did not waive the right to contest compensability of a disc herniation at L4-5, and that the claimant's compensable injury does not extend to a disc herniation at L4-5. The claimant also appealed the hearing officer's determination that the claimant did not have disability from January 5 through June 25, 2009, the date of the CCH. The carrier responded that the claimant's cross-appeal was not timely filed.

DECISION

Affirmed in part, reversed and rendered in part.

TIMELINESS OF CLAIMANT'S CROSS-APPEAL

The hearing officer's decision was mailed on June 30, 2009, to an address different from the last address provided by the claimant as shown on the CCH sign-in sheet. In Appeals Panel Decision (APD) 92199, decided June 26, 1992, the Appeals Panel found an appeal timely when the Texas Department of Insurance, Division of Workers' Compensation (Division) sent the hearing officer's decision to the claimant at an address different from that last provided by the claimant (which was also provided at a hearing). In that decision the Appeals Panel stated it would not impose the five-day, deemed date of receipt provision because the Division failed to mail a copy of the hearing officer's decision to the claimant's last known address. See 28 TEX. ADMIN. CODE §§ 102.5(a) and 102.5(d) (Rules 102.5(a) and (d)). In this case, the hearing officer's decision was mailed to a different address than the one the claimant provided at the CCH. Accordingly, the claimant's response and cross-appeal are timely.

FACTUAL SUMMARY

The parties stipulated that on _____, the claimant sustained a compensable injury in the form of a lumbar strain/sprain while in the course and scope of employment, that the carrier received first written notice of the claimed injury on _____, and that the carrier filed a notice of dispute with the Division on December 5, 2008. On the merits, the hearing officer determined that the disc herniation at L5-S1 was caused or aggravated by, and naturally resulted from the compensable injury. The hearing officer determined that the medical evidence did not establish that the disc herniation at L4-5 was caused or aggravated by, and naturally resulted from the compensable injury.

EXTENT OF INJURY

The hearing officer's determination that the claimant's compensable injury of _____, extends to a disc herniation at L5-S1, but does not extend to a disc herniation at L4-5, is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability from November 6, 2008, through January 4, 2009, but did not have disability from January 5 through June 25, 2009, the date of CCH, is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

That portion of the hearing officer's determination that the carrier did not waive the right to contest compensability of an L4-5 disc herniation is supported by sufficient evidence and is affirmed.

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Division and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. In APD 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of an injury, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

In State Office of Risk Mgmt. v. Lawton,¹ 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, *supra*, would eliminate the distinction between compensability and extent of injury: a dispute about any injury reasonably discoverable within 60 days of the initial notice would be governed by the deadlines for compensability, while information obtained outside that time frame would fall under the deadlines for disputing extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. Similarly, in the instant case, the carrier agreed the claimant had a compensable injury and later disputed the extent of that injury. We find the reasoning set forth in the Lawton decision applicable to the facts in the case at issue. Accordingly, we reverse that portion of the hearing officer's decision that the carrier waived the right to contest compensability of an L5-S1 disc herniation and we render a new decision that the carrier did not waive its right to contest the claimed conditions in accordance with Section 409.021.

SUMMARY

We affirm the hearing officer's determination that the claimant's compensable injury of _____, extends to a disc herniation at L5-S1, but does not extend to a disc

¹ We note that the decision in Lawton, *supra*, is not yet final until opportunities for rehearing have been exhausted.

herniation at L4-5. We affirm the hearing officer's determination that the claimant had disability from November 6, 2008, through January 4, 2009, but did not have disability from January 5 through June 25, 2009, the date of the CCH.

We affirm that portion of the hearing officer's determination that the carrier did not waive the right to contest compensability of an L4-5 disc herniation in accordance with Section 409.021. We reverse that portion of the hearing officer's decision that the carrier waived the right to contest compensability of an L5-S1 disc herniation and we render a new decision that the carrier did not waive its right to contest compensability of an L5-S1 disc herniation in accordance with Section 409.021.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge